IN THE

Supreme Court of the United States

October Term, 1977

No. 77-904

DANIEL L. SHULL,

Petitioner,

vs.

DAIN, KALMAN & QUAIL, INC. and HARRY WARE,

Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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ARGUMENT

The Petition for Certiorari should be denied because:

I. There Are No Special And Important Reasons Why Review On Writ of Certiorari Should Be Granted.

The petitioner-plaintiff suggests that certiorari should be granted because the trial court and the Eighth Circuit made an erroneous ruling on the nature of scienter required by *Hochfelder v. Ernst & Ernst*, 425 U.S. 95 (1976). Specifically, the petitioner claims that the courts below held that proof of recklessness was insufficient to satisfy the scienter required in a 10b-5 case since *Hochfelder*. In fact, however, the trial court made no such ruling because the issue was never raised in the trial court,[1] and it was unnecessary to consider the issue because of a total failure of proof by plaintiff of any actionable negligence, much less fraud. The findings of the trial court below were, as the Eighth Circuit stated quite clearly in its opinion, primarily findings on factual issues. There were no hotly contended legal issues, no finding that recklessness is an inappropriate standard. The case turned simply on the trial court's disbelief of plaintiff's case in chief.

Throughout these findings, it is clear that the court distrusted the testimony of plaintiff Dr. Shull, a chiropractor who made large stock purchases in cash of small denominations, gave admittedly irregular and inaccurate financial statements, had a history of speculative trading, and created an image of wealth in the community.

The trial court, given this distrust, had found "great

[1]Plaintiff did not cite *Hochfelder* in its initial trial brief.

conflict" in plaintiff's evidence and, after weighing it, granted defendants' motion to dismiss at the close of plaintiff's case, including with its order an extensive memorandum. Among the court's findings was a holding that there had been no "fraud" and that "nothing Ware did was for a fraudulent purpose." App. at 9.

That was, however, not the only critical finding by the trial court. It also found that there were no proximately caused damages even if there had been carelessness by defendant Ware. Although the trial court found possible "laxity" in learning the "details" of plaintiff's financial condition, it said that laxity was immaterial, finding that Shull would not have told defendants the full truth about his financial condition in any case. Finally, the court found no reliance at critical points by Dr. Shull, App. 10, lack of materiality as to any possible misrepresentation, App. 9, and failure to comply with applicable statutes of limitations. There was no finding of recklessness by either the trial court or by the Eighth Circuit, nor did plaintiff ask the court to make such a finding under Fed. R. Civ. P. 59(a).

In short, there has been no compliance with Rule 19-1 of the Rules of the Supreme Court, which specifies that review by writ of certiorari "should be granted only where there are special and important reasons therefor." In *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955), the Court discussed the "substance" necessary to grant certiorari:

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy the scholarly interest in such issues. Nor does it sit for

> the benefit of the particular litigants. . . . "Special and important reasons" imply a reach to a problem beyond the academic or episodic.

This was, in all fairness to petitioner-plaintiff, a garden variety Rule 10b-5 case, with a somewhat more colorful plaintiff. The finder of facts made his findings and the Eighth Circuit could find no fault with them under the "clearly erroneous" stand. This is, therefore, an inappropriate case on which to grant a Writ.

II. The Circuit Court Did Not Specifically Decide That A Showing of Recklessness Was Insufficient To Establish Scienter Under Rule 10b-5.

In his Petition, plaintiff argues that the Circuit Court "decided an important question of federal law" and intimates that it specifically held that recklessness does not satisfy the scienter required by *Ernst & Ernst v. Hochfelder*, 425 U.S. 95 (1976). The Eighth Circuit did nothing of the sort. In fact, respondents-defendants agreed in their Eighth Circuit brief that—for purposes of the appeal—recklessness could be taken as the appropriate standard. There is no indication that the Eighth Circuit did not use that standard; even if applied it would make no difference, of course, because the trial court made no finding of reckless behavior; in fact the court implicitly found no reckless behavior.

By finding "laxity" without causation on only one issue the trial court implicitly found no recklessness. There is, in short, no basis whatever for concluding that the trial judge used a narrow definition of fraud or found reckless behavior by defendants yet refused to find them liable.

This is a most inappropriate case to use as a springboard for a broad statement on recklessness and the precise quantum of evidence necessary to satisfy the scienter standard. Petitioner-plaintiff apparently seeks a decision on that issue, despite the fact that its relationship to his case is academic. He has shown that a number of the circuits do in fact hold to recklessness as a suitable standard for scienter. Respondents have agreed, for purposes of the appeal, that recklessness may be taken as a standard and have so argued in their brief before the Eighth Circuit. Nearly all the courts agree that a standard of recklessness is appropriate; there is no seething conflict. Moreover, there is no showing that the Eighth Circuit disagrees, or disagreed in this case. There is in short, no reason for this Court to grant the petition of plaintiff.

CONCLUSION

For the reasons herein stated, the Respondent urges that the petition be denied.

Respectfully submitted,

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